No. 5688

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GENERAL ACCIDENT, FIRE & LIFE ASSURANCE CORPORATION, LTD., a Corporation,

Appellant,

vs.

L. A. CLARK and ETTA CLARK, his wife,

Appellees.

APPELLEES' BRIEF

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In amplification of appellant's statement of the case, appellees wish to make it clear that the judgment of the Superior Court of Yavapai County, Arizona, herein sued on, represented bodily injuries sustained by both appellees, which judgment has, since the trial of this cause been affirmed by the Supreme Court of Arizona.

FIRST ASSIGNMENT

Appellant's first assignment charges error in the overruling of its plea in abatement. The special endorsement required by the rules of the Corporation Commission bound the defendant insurance company to pay, up to the limits of the policy, any person securing a *final judgment* against the insurer by reason of bodily injuries suffered through the operation and use of the automobile covered. This is a form of inurement clause substantially similiar to that required by the laws of many states regulating common carriers by automobile. The question raised for consideration by the plea in abatement was whether the judgment rendered in the State Court, and which formed in part the basis of this action, was, in view of the pendency of an appeal therefrom, a final judgment within the meaning of the inurement clause. The plea in abatement, and evidence submitted in support thereof, failed to show that any supersedeas bond had been filed, or that the State Court had stayed execution. The practice in Arizona requires a supersedeas bond in appeals from personal judgments to suspend execution pending appeal. Par. 1241 R. S. A. 1913.

The test in determing whether a judgment is final is whether it terminates the litigation between the parties on the merits and leaves anything to be done but to enforce it by execution. Words and Phrases on "Final Judgment", Vol 2, Second Edition, Doudell v. Shoo, 114 P. 579, Elliott v. Mayfield, 3 Ala. 223,

Crockett v. Crockett, 106 N. W. 944, State ex rel Potter v. Riley, 118 S. W. 647, State ex rel Smith v. Superior Court, 128 P. 648.

In 23 Cyc. 1503, a part of the chapter devoted to "Actions on Judgments," the general definition of a final judgment is given as follows:

> "To be available as a cause of action the judgment must be a definitive and personal judgment for the payment of money, final in its character and not merely interlocutory, remaining unsatisfied, and capable of immediate enforcement. The pendency of an appeal, writ of error, or petition for review will not deprive plaintiff of his right to sue on the judgment unless there has been a stay of proceedings. A judgment which is void will not sustain an action, but it is not material in this connection that it may be erroneous."

The foregoing text is quoted with approval by the Supreme Court of Arizona in Brandt v. Meade, 17 Ariz. 34, 147 P. 738.

> Similiarly in Ruling Case Law, Vol. 15, p. 904 it is said:
>
> "Ordinarily the effect of an appeal to a court of error, when perfected, is only to stay execution upon the judgment from which it is taken. In all other respects the judgment, until annulled or reversed, is binding upon the parties, as to every question directly decided, and an action on the judgment is not barred by the fact that the judgment has been removed by writ of error to a superior court. Similiarly, if by the law of the state where a judgment is obtained an appeal does not

> stay proceedings on the judgment, the pendency of such appeal is not a bar to an action on the judgment in another state. On the same principle a judgment may be enforced by an action, although a petition has been filed in the trial court to reduce the amount of such judgment."

The Supreme Court of Arizona, in Ariz. Mut. Auto Ins. Co. v. Bernal, 23 Ariz. 276, has passed on the identical question, saying:

> "We conclude that a cause of action against appellant existed in this case when appellee obtained her final judgment against Miranda for the injury she sustained during the life of the policy and concededly covered by its terms, and that the obligation to pay such judgment, within the limits of the policy, directly to her, arose when she demanded its payment by the company."

Thus plainly indicating that the judgment is final for the purpose of action against the insurance company when rendered by the Superior Court. The only means of suspending the right to sue on such a judgment is, as indicated by R. C. L., supra, to give a supersedeas bond and stay further proceedings pending determination on appeal. That case concerned the construction of the same endorsement and the decision of the State Court is, under the prevailing rule, binding upon Courts of the United States.

In Sweet v. Sherman, 21 Vt. 23, it is said:

> "The judgment obtained in the lower court is the 'final judgment' in the suit, even though the case

> is pending in the Supreme Court, within the meaning of Rev. St. etc."

And in 1 Cyc. 31, on Abatement and Revival, it is said:

> "An action to enforce a judgment cannot be defeated by the pendency of an action by the judgment debtor to set such judgment aside."

See also: Boyle v. Mfg. Liability Ins. Co. 115 A. 383; Taylor v. Shew, 39 Cal. 536, 2 Am. Rep. 478; Dow. v. Blake, 35 N. W. 761, 39 A. S. R. 156; Faber v. St. Louis etc. R. Co. 19 Am. Rep. 398; Sublette v. St. Louis etc. R. C. 66 Mo. App. 331; Riley Bros. v. Hoyt, 25 N.J.L. 230; Woodward v. Carson, 86 Pa. St. 176; Dawson v. Daniel, 7 Fed. Cas. 3,668; Wehrhahn v. Ft. Dearborn Cas. Underwriters, 1 S. W. (2d) 242; Ind. Ins. Co. v. Davis, 143 S. E. 328.

Therefore, the pendency of an appeal does not affect the finality of a judgment unless a supersedeas or stay bond is given as required by statute, or unless, by the laws and practice of the state, the perfecting of an appeal ipso facto suspends execution; an action may be instituted upon the judgment in another state and the pendency of an appeal in the state where the judgment was rendered may not be pleaded in bar or in abatement.

This is the rule of the authorities under the faith and credit clause of the Constitution, and the Courts of the United States are bound to give judgments of the state courts the same faith and credit that courts

of one state are bound to give the judgments of the courts of her sister states. Cooper v. Newell, 173 U. S. 567, 19 S. Ct. 506, 43 L. Ed. 808; Wisconsin v. Pelican Ins. Co. 127 U. S. 291, 8 S. Ct. 1370, 32 L. Ed. 239; Galpin v. Page, Sawy. 93, 9 Fed. Cas. No. 5,206. The situation of this case is, therefore, no different than if it were pending in the courts of the State of Arizona, or in the courts of any other state.

The question came incidentally before the Supreme Court of Arizona in Smith Stage Co. v. Eckert, 21 Ariz. 28, 184 P. 1001, where the effect of the same inurement clause was considered.

They say:

> "It appears from what we have said that the words 'loss and damage' mean a real loss—one at least so far as the indemnity company is concerned, that has been *put into judgment* against the assured."

also

> "One of the terms of the policy is that the injured person must first *establish his claim by suit* against the assured."

again

> "— — it was within the contemplation of the contracting parties that the injured person must first established his claim against the wrongdoer in his action for negligence and thereafter be assured of the fruits of his victory from the indemnity company."

All that is required of the injured party is that he establish the amount of his unliquidated claim of damages by judgment to be entitled to direct recourse against the indemnity company. If the latter, being the real party in interest, is not satisfied with the amount thus fixed it must ,if it desire to suspend further effort to collect, give a supersedeas bond. The plaintiff has obtained his judgment, in all respects final, and is entitled to proceed by action against the insurer. Nor is it of any consequence that the insurer may thus be required to secure plaintiff in a sum far in excess of its liability under the policy. Seessel v. New Amsterdam Casualty Co. 204 S. W. 428. In that case it was said:

> "The fact that, if the defendant had provided security upon the supersedeas bond, its liability would have been increased beyond the amount of the indemnity in the policy, did not justify the company in refusing to either pay to the limit of its policy or defend the suit. The prospective financial condition of the complainant, the possibility of a judgment against him for more than $5,000, and the liability incident to making a supersedeas bond to cover such a judgment, are matters which the indemnity company should have had in contemplation, and the risk incident thereto rightfully falls upon it. The law does not release a party to a contract from liability already incurred, because, in order to remove that liability, it becomes necessary to incur the risk of greater liability. It has been held by other courts, in construing policies containing conditions essen-

> tially similiar to these, that the obligation was upon the surety, when dissatisfied with the judgment obtained against the principal, to provide the bond for appeal and protect the insured from execution until the suit is terminated."

To the same effect are Rochester Mining Co. v. Md. Cas. Co., 128 S. W. 204, and Pacific Coast Cas. Co. v. Bonding & Cas. Co., 240 Fed. 36 (9th C.)

The precise question here involved was considered in Pape v. Red Cab. Mut. Cas. Co., 219 N.Y.S. 135. An indemnity insurance policy, given under the Highway Law of New York, bound the insurer to pay on "final determination of the litigation after trial of the issue." The court held this expression to be synonymous with "final judgment", and, after stating the latter expression is susceptible of two significations, said:

> "One, which in a strict legal sense is its true meaning, viz: a determination of the rights of the parties after a trial, whether such is the subject of review or not; and the other, its colloquial use or signification, which makes it synonymous with decisive, or a judgment that cannot be appealed from, and which is perfectly conclusive upon the matter adjudicated."

Continuing, the Court said:

> "The express language of the clause in the policy would seem to indicate that it was not intended to fix the insurer's liability upon the determination of the litigation beyond all possibilities of appeal. If there were any doubt in the matter it is disposed of by the mandatory language of the statute

> which makes the indemnitor liable "for the payment of any judgment recovered" against the principal. A reasonable construction of the statute obviously requires that such a judgment must be enforceable by execution, and that a stay thereof pending appeal suspends the liability of the insurer: otherwise, in case of a reversal upon such appeal, the indemnitor would remain bound although the principal had been excused. Undoubtedly this would produce a rather anomalous situation."

The question there raised, as here, was whether, by reason of the pendency of an appeal in the action against the principal, there was such a final determination of the main litigation as to impose any liability under the policy. See also Indemnity Ins. Co. v. Davis, 143 S. E. 328.

If the plea in abatement were good an injured person would be held away from his recovery by a frivlous appeal which could in any case be taken by the mere giving of a bond for costs, and without giving any security which would compensate plaintiff for the intervening loss of time. Defendant should be required to substitute its liability in an action such as this for its liability on a supersedeas bond. This would preserve equality between the parties.

A careful reading of appellant's authorities concerning the meaning of the term "final judgment" will reveal the following:

In Dean v. Marshall, 35 N.Y.S. 724, a stipulation of

the parties provided for an appeal and payment after final determination. Obviously this means after the appeal which was in contemplation of the parties;

In Blanding v. Sayles, 49 Atl. 992, and Bixler's Appeal, 59 Cal. 550, the judgments were judgments in special proceedings which, by statute, were made final, the court construing "final" to mean "final and conclusive", so that no appeal would lie;

In Annis v. Bell. 64 P. 11, the statute provided for a stay of judgment by appeal in that character of case.

Obviously, none of these cases is any authority for appellant's proposition, and do not approach, in point of authority, the cases cited above which have direct reference to the efficacy of an appeal to stay a judgment upon suit in another jurisdiction where execution has not been superseded in the court where the judgment was rendered.

Wolf v. District Court Northern California, 235 Fed. 69, is not in point, for the reason that there the judgment was in an action to quiet title and not a personal judgment for the recovery of money, hence no supersedeas was necessary to suspend the finality of the judgment. This holding is perfectly consistent with the cases heretofore cited which hold that where the taking of the appeal itself suspends the judgment, and prevents its enforcement in the court below, no action can be maintained on the judgment in another court during the pendency of the appeal.

Fidelity & Casualty Co. v. Fordyce, 41 S. W. 420, cited in appellant's brief, is not in point. The policy there did not bind the insurance company to pay on "final judgment" in favor of the injured person. The essential language of the policy here involved was there conspicuously absent. Neither were the rights of any injured third person directly involved in that case. The same is true of Schroeder v. Columbia Cas. Co. 213 N.Y.S. 649.

The Court will bear in mind the distinction between indemnity against "loss", and indemnity against "liability imposed by law." In the former recovery can be had only where the assured has actually paid the judgment; in the latter where the amount of the recovery has been fixed by judgment. The pendency of an appeal from such a judgment does not affect the rights of a person for whose benefit the insurance was given unless the finality of the judgment has been stayed in the manner required by statute.

SECOND ASSIGNMENT

The second assignment charges error in the refusal of the court to permit the filing of an amended demurrer and answer on the day of trial. It is not, however, charged that such refusal was an abuse of discretion. It will be noted from the record and from appellant's brief, that appellant filed first its general demurrer and plea in abatement, the former of which was stricken as frivolous and the latter as sham, and judgment rendered notwithstanding the same under R. S. A. par. 473.

There is nothing in our practice to prevent appellant from having interposed at that time all of its defenses. Indeed our practice statute, par. 467, requires that all pleas, both as to law and fact, shall be filed at the same time, including (sub-division 2) matters in abatement of the suit. After the summary judgment was vacated appellant was permitted to file the answer, consisting of the same general demurrer and a full answer to the merits, which was submitted in connection with its motion to vacate. Appellant might then have set up its additional answers had it so chosen and thereby made its showing stronger. It thus readily appears that appellant had ample opportunity on two occasions before the setting of the case for trial to interpose its complete defense.

The refusal to permit the filing of an amended answer was an exercise of discretion by the court. Our statute, chap. 14, Sess. Laws 1925, amending par. 422 R. S. A. 1913, requires amended pleadings to be filed not less than five days before trial without special leave. Appellant had previously exhausted its right of amendment of course under Rule 15 of the District Court, and failed to comply with Rule 18 with respect to motion and notice for leave to amend. Therefore, under neither the practice act of Arizona, nor the rules of the District Court, had appellant any right to further amend, and in view of the fact that additional defenses were interposed and submitted for leave to file on the day of trial, without opportunity to appellees to prepare, appellant having had ample

time before to file all of its defenses, it is difficult to see how the refusal of the court could be held error, not to say an abuse of discretion.

Neither of the two additional defenses, however, had any apparent merit. The first set up failure to give twenty days' notice of the accident, notwithstanding the complaint alleged, and the answer admitted, (paragraph VI, respectively) that this defendant appeared for and represented George Ross, the assured, throughout the suit in the state court which resulted in the judgment herein sued on. It appeared to the court from the pleadings then on file that appellant had notice of the occurrence of the accident and had actually conducted the defense of the other suit, which was the only utility of notice under the inurement clause. Notice is given to impart knowledge, not to apprise a party of facts which are already in his possession. In this connection, 36 C.J. p. 1109, Sec. 98, says:

> "By assuming the defense of the action against insured, insurer may be precluded from avoiding liability on the ground that insured has failed to comply with a provision of the policy requiring him to give immediate written notice of an accident."

If this is true between the immediate parties, how much more true should it be between the insurer and a third person for whose benefit the contract of insurance was made. The first separate defense was, therefore, both sham and frivolous, and the court properly

refused permission to file it. (Tr. Rec. 42).

The second separate defense set up the liability limits of the policy. This raised no issue which could not have been proved under a general denial, (Tr. Rec. 42) and appellant is now urging its point with respect thereto under the pleadings therefore on file. The question is fully raised by plaintiffs' own evidence.

The special demurrer alleged that two causes of action were improperly united. The judgment sued on was rendered for injuries to both plaintiffs, husband and wife, and this action seeks a recovery under the judgment and policy for the benefit of both. Since the judgment is joint they are properly joined as plaintiffs. The cause of action is entire, not several. If their joinder was not proper that question should have been raised in the state court. Not having been raised there it is res adjudicata and cannot now again be litigated. This Court will not go behind the judgment of the state court any further than may be necessary to ascertain the identity of the issues tried. The judgment being joint, the recovery here may be joint to the full limits of the insurance to two persons, provided, only, the Court finds that injuries to two injuries were pleaded, proved, submitted to the jury and found by them. 36 C. J. 1121, has the following to say:

> "Where the insurer is notified of the pendency of an action against insured in reference to an injury or liability covered by the policy and is given an opportunity to defend such action as required by

> the policy, whether it does or does not defend or take part in such action, a judgment against insured therein is conclusive upon insurer as to all questions determined which are material to a recovery against it in an action on the policy, and the pleadings, instructions, and verdict in such prior action are admissible to determine what issues were tried therein. - - where the defense therein was conducted by insurer it is not entitled in an action on the policy to any defense that it might have raised on the trial of the other action."

However, under all of the authorities that have passed on the question claims for injuries to husband and wife are community property and both may be joined in a single action as elements of one cause of action. Bancroft's Code Pleading, Vol. 3, p. 2492; Labonte v. Davidson, 175 P. 588; Ezell v. Dodson, 60 Tex. 331; Hawkins v. Front-Street Cab. Ry. Co., 28 P. 1021 (Wash.)

This is upon the theory that all property acquired by either husband or wife during the marriage, except that which is acquired by gift, devise or descent, is community property; that a claim for damages to either or both is a chose in action, and consequently property, and does not fall within any of the exceptions. As an acquest to the community each has a vested interest in the recovery of the other.

Hawkins v. Front Street, supra, is a Washington case, and the Arizona Supreme Court has held (Cosper v. Valley Bank, 28 Ariz. 373, 237 P. 175) that the Arizona statute relating to community property

follows the views prevailing in that state. It is, therefore, also the law of Arizona that injuries to both husband and wife, or claims of either on account thereof, being parts of the community in which each has a vested interest, may be sued for and recovered in a single action, and that such is not an improper joinder of parties or of actions.

Obviously all of the authorities cited by defendant under this topic follow the common law rule and are not authority in jurisdictions where the more modern doctrines of community property rights obtain. This rule, of course, has relation only to actions for injuries to husband and wife.

THIRD ASSIGNMENT

The third assignment charges error in the admission in evidence of the printed Abstract of Record prepared and filed by appellant in the Supreme Court of Arizona on appeal from the judgment against its assured, showing the pleadings, instructions, verdicts, and judgment in the former action. There was no denial in the answer that a judgment of the character, and in favor of the persons, and upon the cause of action, alleged in the complaint was rendered. In fact paragraph VI of the answer admits that fact. It therefore became necessary only to prove its terms, and the issues joined, submitted and determined which resulted in the judgment.

State court judgments are not foreign judgments in courts of the United States of that District, and the

exemplification act does not apply to them. Reliance is placed by appellant upon the provisions of Rule 43 of the District Court, and par. 1739, R. S. A. 1913, with reference to the mode of proving public records. Suffice it to say that there is nothing in that statute which makes the method therein indicated the exclusive mehod of proving the contents of public records. Its provisions are permissive merely, and not mandatory. The existence of the judgment pleaded was admitted by appellant, and the proof offered of the terms of the record was of a character conclusive and binding upon it. Appellant, itself, prepared and filed the record admitted, in the Supreme Court of Arizona. The copy introduced showed by the printed inscription that it was prepared by present counsel for appellant, who, paragraph VI of the answer admits, represented George Ross, as the insured, throughout the suit in which the judgment was rendered. Mr. Holton, of counsel for appellant, admitted on the stand that the Abstract of Record was prepared in his office and filed in connection with the appeal set up in the plea in abatement. Appellant was, therefore, estopped to question the correctness of the contents of the Abstract, since the only materiality of the record was proof of the terms and effect of the pleadings, instructions, verdicts and judgment. There is no suggestion by appellant that the Abstract does not correctly show those portions of the record, nor could any such position be taken without admitting that a fraud had been practised on the Supreme Court.

This assignment, if technically sustainable, is error without prejudice.

FOURTH ASSIGNMENT

Under this assignment it is urged that the admission of the policy as plaintiffs' exhibit 2 was error, in that it was not made to appear that the Paige sedan therein described was the automobile which occasioned the accident and is referred to in the complaint. This policy, at a former stage of the case, was introduced by appellant in support of its plea in abatement, and upon trial of the action was produced by appellant from its files after its number had been given in evidence from the records of the Corporation Commission, as the policy of George Ross in effect on the date of the accident. There never was but one automobile concerned in either cause. The same policy was offered in evidence twice, once by appellant and once by appellees. Appellant, by offering the policy in support of its plea in abatement, conclusively admitted that the automobile described is the one which occasioned the accident for which the judgment was rendered, and the one referred to in the complaint. On no other theory could it be material under the plea in abatement.

Moreover, as the issues were finally joined no question was raised that the automobile which occasioned the accident, the one referred to in the complaint, and the one described in the policy, was not one and the same. The plea in abatement alleges liability in-

surance coverage, together with the terms of the inurement clause endorsed by rule of the Corporation Commission; par. II of the complaint alleges that Ross used in connection with his taxi business one certain Paige sedan automobile, which is admitted by par. II of the answer; pars. III and IV of the complaint allege that Ross was required to and did obtain from defendant and file, with the inurement clause, a policy of insurance covering *said* Paige sedan, and par. IV of the answer alleges substantially the same facts; par. V of the complaint sets up the accident and injuries to plaintiffs, and each of them, which occurred by means of said Paige sedan, which is denied by the same paragraph of the answer; but par. VI of the complaint alleges that judgment for $15,000, in favor of plaintiffs, jointly, was recovered against Ross on account of *said* injuries, sustained by means of *said* Paige sedan, which is ADMITTED by the corresponding paragraph of the answer. In other words appellant denied the occurrence of the accident by said Paige sedan, but admitted that the judgment on account thereof, by means of the same car, was rendered. The latter is the only material fact. Whether that car was really the one involved in the accident, as well as whether Ross was really at fault, was determined by the former judgment and is now res adjudicata and cannot be litigated again. 36 C. J. 1121, supra. That fact, having once been determined, it is immaterial that appellant continues to deny it.

There is nowhere in the pleadings any suggestion

of a denial that the car which caused the accident was covered by a policy of the defendant. In fact, as we have shown, the conclusion is the other way. Par. II of the second separate defense, leave to file which was refused, and which appears on pages 41-42 of the Transcript, alleges merely lack of information upon which to base a belief. Manifestly, this is not good faith. The automobile was the property of their insured whose defense they conducted. Their insured knew what automobile was involved in the accident, and under their policy he is required to assist them in every manner. There is privity of contract between them and whatever is imputable to the knowledge of one is equally imputable to the knowledge of the other. The identity of the vehicle covered, being peculiarly within the knowledge of appellant, the burden was upon it to prove that the Paige sedan which occasioned the accident was *not* covered by their insurance, or by the policy doubly placed in evidence. The character of this assignment is obvious.

FIFTH AND SIXTH ASSIGNMENTS

These assignments charge error in the reception in evidence of plaintiffs' exhibits 3 and 4, being correspondence with Standard Agency, Inc., of Phoenix, respecting the accident. The letters are dated July 7th and 11th, respectively, (within a week after the accident which occured on July 2d). Appellant makes the error of treating this correspondence as with B. F. Hunter personally. The fact is that letters were addressed to him as adjuster, and his letter is signed

below the name "STANDARD AGENCY, INC.", as adjuster. It will be noted that the policy (pp. 27-28, 40, 78, Tr. Rec.) was countersigned by STANDARD AGENCY, INC., so there is no question about that company being the proper party to notify of the accident. Regardless of how the initial letter was addressed it fully appears that ultimate notice reached the accredited representative of the insurer well within th required twenty days. It will be observed that on page 73 of its brief appellant admits that "its agent was THE STANDARD AGENCY, INC., at Phoenix, Arizona." The agent being corporate appellees could not control the identity of the individual who should give the matter attention.

However, the giving or failure to give notice was not a material issue in the case, as we have shown under the second assignment, supra, appellant having previously conducted the defense of its insured and being fully aware of all the facts. A casual perusal of the reporter's transcript introduced herein sufficed to show the trial court that appellant was well prepared for the defense of the prior action. The most formal notice would not have been of any additional help.

SEVENTH ASSIGNMENT

The error urged in connection with this assignment is the refusal of the court to strike the Abstract of Record, and has been fully treated above.

EIGHTH, NINTH AND TENTH ASSIGNMENTS

These are treated under the 13th, 14th and 15th assignments.

ELEVENTH AND TWELFTH ASSIGNMENTS

These assignments charge error in the refusal to permit counsel for appellant to testify that counsel for appellees, in the former action, stated in his argument to the jury that he did not claim damages on account of injuries to plaintiff, L. A. Clark. This is in the nature of a collateral attack upon, or impeachment of the record, and was properly rejected. Had such an admission been made appellant, as the defendant in the former suit, should have requested of the court an appropriate instruction to the jury. Otherwise the jury would not be limited in the findings it made under the evidence and instructions. Appellant concedes that their insured, Ross, could not now be heard to complain that no segregation was made in the verdict or judgment. How, then, can this defendant-appellant, who stood in the substituted place of Ross and who is as firmly bound by the former record as Ross himself, be heard to question any of the former proceedings?

THIRTEENTH, FOURTEENTH AND FIFTEENTH ASSIGNMENTS

The matters covered by these assignments have been fully considered above. There is only one new point: that the evidence failed to show any apportionment between plaintiffs. It is urged that the principle of

estoppel by judgment does not extend to a record which fails to show upon which of two or more independent causes of action or defenses the judgment was rendered. The complaint in the state court was in three counts, the first for simple negligence for personal injuries, the second the same with an allegation of gross negligence, wantonness and intoxication, and the third simple negligence for damages to plaintiff's car. The Arizona statute allows actions for the recovery of damages for injuries to the person and property, growing out of the same tort, to be sued for in the same action, if separately stated. Par. 427 as amended by Chap. 34, Sess. Laws 1921. The third count was dismissed at the conclusion of plaintiffffs' main case, and the instructions of the court show (Tr. Rec. pp. 104-105) that the cause was submitted to the jury on the first two counts, the only difference between which was the allegation appropriate to the recovery of punitive damages, and the prayer therefor. The verdict is segregated as between these two items of recovery, one verdict for $12,000 being for compensatory damages, and the other for $3,000, punitive dameges. (Tr. Rec. pp. 117, 119). It can, therefore, be ascertained with certainty from a bare inspection of the record just what the jury found upon the issues as joined, proven and submitted. This is all that is required and appellant's position with reference to the rule on estoppel by record is not well taken.

The court, under the authority of 36 C.J. 1121, supra, looked to the pleadings, transcript of the evi-

dence, instructions and verdicts in the former action to determine what issues were tried therein, and found therefrom that the verdicts and judgment rendered thereon were for injuries sustained by both plaintiffs. They, being husband and wife, under our community property statute, were enabled to maintain one action for the recovery of both, and their right of recovery here is as broad as the right obtained under the judgment in the former action. Appellant represented the nominal defendant in the former suit and was in practical effect the defendant in that action. It knew that a joint action was being maintained, and that a joint judgment was sought. It knew also its interest in the suit as well as the provisions of the policy, and if it desired to avoid the situation now presented it should have asked and obtained a segregation of the verdicts, or at least the one for actual damages, as between the plaintiffs. The matter of which appellant now complains was peruliarly its own neglect and it cannot now take advantage of it. Morrell v. Lalonde, 120 Atl. 438.

Brookside-Platt Mining Co. v. McAlister, 72 So. 18, relied on so strongly by appellant is no authority for it. That was an Alabama case where the rule governing acquisitions of the marital community is radically different from Arizona. A husband and wife, in Arizona, have a joint interest in the recoveries of each other for bodily injuries, and can maintain a joint action therefor. (Hawkins v. Front-Street, supra.) The McAllister case is clear authority for the proposition

that where persons have a joint interest they must sue jointly for an injury to it, on the theory as there announced, that it is not the injury but the consequences flowing from it that gives the right of action. In addition, our par. 403 requires joinder of husband and wife in actions to which the wife is a party, except where the subject matter concerns her separate property. This is for no other reason than that the husband has a joint interest (or liability) in whatever concerns his wife, to which interest he may join his own claim.

Appellant contends it is not liable in any event for punitive damages. On this question Morrell v. Lalonde, 120 Atl. 435, says:

> "The defendant insurance company by the terms of its liability policy agreed to indemnity defendant to the amount stipulated therein 'against loss from the liability imposed by law upon the assured for damages on account of *bodily injuries* or death suffered by any person or persons in consequence of any malpractice, error or mistake of the assured in the practice of his profession.' The defendant company was liable to the amount insured to pay any lawful damages which in a case, such as the case at bar, includes punitive as well as compensatory damages."

At all events, the judgment of the Supreme Court of Arizona on appeal, and the remittiturs which have been filed in pursuance of its directions, satisfies every legitimate requirement of appellant with respect to apportionment of damages between the plaintiffs.

Those remittiturs reduce the amount of the verdicts to the amount of appellant's contractural liability and do not disturb the essential basis upon which the judgment here appealed from rested.

Moreover, the judgment appealed from is not as great in amount as it should have been under the terms of the policy. Sub-division (3), Tr. Rec. p. 67, is as follows:

> (3) To Pay, irrespective of the limits of liability expressed in Statement 8 of the Schedule of Declarations, all *costs* taxed against the Assured in any legal proceeding defended by the Corporation, all *interest* accruing after entry of judgment upon such part thereof as shall not be in excess of said liability- - - "

Appellant is liable, therefore, in addition to the amount of the state court judgment, not in excess of $10,000, for the costs taxed against Ross, $196.35, (Tr. Rec. 119), and interest on $10,000 from November 9, 1927, until paid, at the rate of six per cent. per annum. It will be noted the judgment in this action (Tr. Rec. 34) is for $10,000, and costs herein assessed at the sum of $29.60.

It is, therefore, respectfully submitted that the judgment herein is for an amount not in excess of appellant's liability, and, the judgment of the state court not having been reduced below that amount, no occasion exists for disturbing the effect given it by the trial court and the judgment should be affirmed with directions to enter judgment in favor of appellees for

$10,000, with interest thereon from November 9, 1927, until paid, at the rate of six per cent. per annum, for $196.35 costs in the state court, and costs herein.

Respectfully submitted,

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